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REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL

TRANSFER OF DEVELOPMENT RIGHTS FOR RANCH AT STALLIONS CROSSING
(Item no. 336 on the docket for 10/22/96)

INTRODUCTION

On October 22, 1996, the City Council will consider certain development applications known collectively as Stallions Crossing. The consideration of these applications arose out of the settlement of litigation between the City of San Diego ("City") and the property owner San Dieguito Partnership ("SDP"). One of the applications is for a development known as the Ranch. The Ranch application includes a proposed transfer of development rights from certain property owned by the City to the Ranch.

The purpose of this Report is to address the question of whether the proposed transfer of development rights is within the power of the City to approve. Our conclusion is that it is. The City has the general police power to allocate development rights, and there is no limitation on the exercise of that power in this fashion. In addition, the transfer would not violate Proposition A[1] as it would be "neutral" within the meaning of that Proposition.

[1]As used in this memorandum, "Proposition A" means that Proposition adopted by the electorate of the City on November 5, 1985, and which became part of the City's Progress Guide and General Plan. In relevant part, Proposition A allows changes to the restrictions on development within the NCFUA (as they existed on August 1, 1984) that are "neutral or . . . more restrictive in terms of permitting development."

BACKGROUND

In June of 1996, the City entered into a settlement agreement with the SDP which settled certain litigation then pending between the parties. The settlement agreement called, in part, for the City to consider transferring certain residential development rights from 556 acres of City Water Utility land in the San Pasqual Valley (the "transferor parcel"), but within the Future Urbanizing Area ("FUA"), to the 47.7 acre parcel of property, owned by SDP and known as the Ranch, located in the lower San Dieguito River Valley but in a different area of the FUA known as the North City Future Urbanizing Area ("NCFUA").[2] Absent the transfer, the Ranch would be allowed a maximum of four (4) residential units pursuant to the existing zoning (A-1-10), and 10 units pursuant to the Planned Residential Development ("PRD") provisions of the Municipal Code (one unit per four acres). The purpose of the transfer is to allow the City Council to consider approving the staff's reduced project alternative, which is a residential development of 47 single family detached units on the Ranch, without the need for a "phase shift" vote of the electorate, otherwise required by Proposition A.[3]

The transferor parcel (actually made up of a number of parcels) is located to the east of Lake Hodges, in the San Pasqual Valley. That parcel is currently leased, primarily for agricultural purposes. To accomplish the transfer in the required amount of development units, the maximum number of residential development rights available on the transferor parcel is calculated pursuant to the PRD regulations. The necessary number of the marginal development rights (between what would be available pursuant to the underlying zone and the amount available pursuant to the PRD regulations) is then proposed for transfer to the Ranch, leaving a residual number of residential development rights available on the transferor parcel.[4] The mechanics of the calculation are more fully explained in Attachment 1, prepared by Development Services.

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[2]The NCFUA received that designation through the adoption of the Framework Plan for the North City Future Urbanizing Area, adopted by the City Council in 1992.

[3]SDP proposes a 90 unit development at the Ranch, which would require the transfer of 80 units from the transferor site. Such a transfer would also be legal, if the Council wishes to approve SDP's proposal, for the reasons outlined in this Report.

[4]The transfer proposal affects only residential development rights, not other uses available under the existing zoning.

ANALYSIS

I. THE TRANSFER IS WITHIN THE GENERAL POLICE POWER OF THE CITY.

There can be no question that the allocation of development rights is within the general police power of a municipality. The most common form of this allocation is by zoning. See generally Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365, 391-394 (1926). Other means are available to regulate the allocation of development rights amongst parcels of property. For example, the availability of the PRD (and Rural Clustering) regulations is a different means of development right allocation available at the option of the property owner, upon discretionary approval by the decision maker. See generally Aptos Seascape Corp. v. County of Santa Cruz, 138 Cal. App. 3d 484 (1982), rev. den. A "transfer of development rights" program, commonly know as a "TDR" program, is another alternative, generally adopted by municipalities to allow for a reallocation of development rights to avoid a "takings" claim in situations where the municipality desires to preserve private property. See generally Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978). Such a program acts by allowing a municipality to offer a relocation of existing development rights from one parcel to another, and resultant preservation of the transferor parcel as, for example, open space. See Barancik v. County of Marin, 872 F.2d 834, 836-837 (9th Cir. 1989), cert. den; American Savings & Loan Assn. V. County of Marin, 653 F.2d 364 (9th Cir. 1981); Aptos Seascape Corp., 138 Cal. App. 3d 484. Normally, a TDR program acts without the consent of the affected property owner, who is forced to utilize the program before a takings claim is ripe.

In this case, the proposed transfer is essentially a voluntary one between the City and SDP. Also, it is not being undertaken with the direct purpose of preserving the transferor parcel, although it does have the salutary effect of limiting future development of that parcel. Despite these differences, we see no valid distinction between the allocation of development rights through a traditional TDR program and the act being proposed here. In other words, if a nonconsenual TDR program is within the police power of a municipality, there should be no question that a voluntary transfer of development rights is also within that police power unless otherwise restricted by law.[5]

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[5]We are quick to point out that in approving the transfer, the Council is acting in its capacity as the legislative body with jurisdiction over land use matters within the City. By acting in its capacity as party to a lawsuit, entering into the settlement agreement, and agreeing to consider transferring the development rights, the Council has not committed itself to the transfer. The Council retains its full discretion to approve or deny the transfer.

Traditional TDR programs are usually implemented pursuant to an enabling statute. The City has no such overall enabling statute[6], but that does not mean that the voluntary transfer proposed here may not be implemented. The City is a charter city under the California Constitution, Article XI, Section 5. The City's charter acts not as a grant of power, but as a limitation on powers the City may otherwise exercise. City of Grass Valley v. Walkinshaw, 34 Cal. 2d 595, 598-599 (1949). In addition, a charter city may act without regard to contrary state law in those matters commonly known as "municipal affairs," but is restricted by superior state law in matters of "statewide concern." See generally DeVita v. County of Napa, 9 Cal. 4th 763, 783 (1995); Taylor v. Crane, 24 Cal. 3d 442, 450 (1979). Therefore, unless otherwise restricted by the City Charter or superior state law of statewide concern, the City may approve the transfer proposed herein.

On the latter point, land use regulation is generally considered a municipal affair and thus within the purview of charter cities. DeVita, 9 Cal. 4th at 781 - 782. More importantly, however, there is no state law of which we are aware which would restrict or limit the ability of the City to undertake the proposed voluntary transfer.[7] On the former point, there is nothing in the City's charter which would preclude the City from approving the transfer.[8] Thus, it is our conclusion that the City may approve the transfer as part of its general police power to allocate development rights between parcels of property.

II. THE TRANSFER WOULD NOT VIOLATE PROPOSITION A.

The question of whether a transfer of development rights, in the fashion proposed, would violate Proposition A was answered in the negative by this office in a memorandum of law dated December 4, 1995, analyzing a proposed specific plan for Subarea V of the NCFUA. A copy of that memorandum is enclosed as Attachment 2 and its reasoning is adopted herein.

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[6]The City does have certain "density bonus" provisions using a transfer of density rights concept in the area of affordable housing. Municipal Code §§ 101.0307 - 101.0307.6. These provisions do not otherwise act as a limitation on the City's power.

[7]The state Zoning and Planning Law is specifically not applicable to charter cities. Cal. Govt. Code § 65803. In addition, there is nothing in that law that prohibits a transfer of development rights.

[8]The fact that the City has no formal TDR program or enabling statute does not act as a restriction. The principle that a charter acts only as a limitation allows the City to exercise powers unless otherwise restricted. Since the is no restriction, the power may be exercised.

In sum, Proposition A allows land use actions within the FUA that are "neutral." As set out above, the transfer herein (similar to that proposed for Subarea V) reallocates existing development rights within the FUA; it does not increase the overall density. It is thus our opinion that the act of transferring development rights within the FUA is "neutral" within the meaning of that term as used in Proposition A.[9] Thus it is our conclusion that the transfer proposed herein would not violate the plain meaning of Proposition A.

CONCLUSION

The ability to reallocate development rights through a transfer of such rights, whether between consenting or nonconsenting property owners, is within the general police power of the City. There is no limitation on that power in the City's charter. In addition, such a transfer within the FUA does not violate Proposition A. It is thus our conclusion that the City may approve the transfer of development rights as proposed by staff for the reduced project alternative for the Ranch at Stallions Crossing.

Respectfully submitted,

JOHN W. WITT
City Attorney

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Attachment
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[9]The 1995 Memorandum of Law addressed only a transfer within a subarea of the NCFUA. The effect of Proposition A, however, is not limited to the NCFUA but extends over the entire FUA. There is thus no limiting language in Proposition A that would prohibit the transfer proposed here. Indeed there could not be, as the concept of the NCFUA and its subareas, embodied in the Framework Plan for the NCFUA, was adopted after Proposition A.